INCREASE OF CAPITAL STOCK OF A CORPORATION—PRIMARY RIGHT OF AN ORIGINAL STOCKHOLDER TO PURCHASE NEW STOCK.

In the case of *Stokes v. Continental Trust Co.,* decided in the New York Court of Appeals on November 13th, 1906, a question was decided which will certainly bear much discussion.

In that case, Stokes, the appellant, was the owner of 221 shares of the original stock of the Trust Company, out of a total of 5,000 shares at par value of $100 each.

It was not questioned that the company was exceedingly prosperous and that it was unnecessary to issue any more stock except as it might be for the best interest of the stockholders. Blair & Company, a firm of private bankers, said to be representing Marshall Field and others, proposed to the directors of the Trust Company that the number of shares be increased from the original number of 5,000 shares to 10,000 shares; the capital from $500,000 to $1,000,000; and that *all* the addition—5,000 shares—be sold to Blair & Company at $450 per share, with the condition that the buyers be allowed to name ten of the twenty-one trustees to be chosen at the next meeting. The bonus offered was, therefore, $350 on each share. The proposition was accepted by the directors and a special meeting duly warned and called and, by a vote of 4,197 shares of the original stock, the deal was put through. Stokes, the appellant, knew the object of the meeting, attended it and agreed to the increase of stock—but objected to the sale to Blair & Company. He then demanded the right to buy as many of the new shares as his holding of the original shares bore proportion to the whole number. The directors agreed to take his proposition under consideration and later the entire new issue was sold to Blair & Company at the agreed price—$450 per share. At the time of the sale the book value of the stock was $309.69 per share; the market value $550, and at the time of the first trial the price had risen to $700 per share.

Stokes sued for damages for the failure to deliver the stock according to his offer—221 shares at $100 each. The trial court awarded him the difference between the market value and par value on the day of the sale, $450 for each share to which he was entitled. The Appellate Division reversed the decision, allowing him no damages, and the Court of Appeals modified the former holding, allowing him the difference between the price set by the directors in the sale to Blair & Company—$450—and the market value of the day of the sale which was $550, a difference of $100 per share.

It was decided, with little contention, that the appellant had the legal right to subscribe for and take the same number of shares of the new stock that he held of the old, as the new issue corresponded exactly with the original issue in number of shares. The text-books and reported cases show a few cases to the contrary, but a careful reading of these cases show that the holding is correct at common law—the cases cited involving generally the construction of statutes. Now comes a rather anomalous holding. From the facts it appears that the rapid increase in the value of the shares was directly attributable to the offer of Blair & Company, who were the

representatives of Marshall Field & Company, and other strong interests, and that this offer was noised about the financial circles. Appellant was willing to have the stock increased—though there was no other reason for the increase than this offer—and, though it does not clearly so appear, also agreed that if 221 shares were sold to him (appellant) at par, the balance might be sold to Blair & Company, or any one else. Judge Vann, in the majority opinion, held that the company had an undisputed right to place a price of $450 each on the shares and that, even if the appellant had the right which he claimed to buy the shares, he must pay—not the par value—but the price set by the company. It is to be regretted that this point was not gone into more fully. No case sustaining the holding is cited and a search of the authorities seems to hold the other way. In a carefully written dissenting opinion, Judge Haight holds, and with apparent correctness, that the appellant cannot, in the same breath, consent to an increase of stock in acceptance of Blair & Company's offer and also demand that he (appellant) be allowed to cut down the allotment to Blair & Company, thereby reaping the benefit of an advance admittedly due to the knowledge of the public that Blair & Company were to acquire the stock and interest their strong financial backing in appellant's corporation.

The case decides that the offer by Stokes of the par value was sufficient to bind the corporation to deliver to him the shares—not, however, at par—but at $450 each, and that no new offer at the increased price was necessary.

It is rather difficult to see just how this conclusion was arrived at, except on the principle that the company was absolutely bound to sell appellant the new shares, and this brings us back to the original question of the corporation's right to jump the price from $100 to $450 to appellant, an original stockholder. Of course, to hold that it was a price fixed independently by the directors is to lose sight of the fact that it was arbitrarily reckoned in response to the offer of Blair & Company. The case of *Gray v. Portland Bank*, 3 Mass. 364, holds, that on a refusal of a corporation to sell to a stockholder (original) his proportionate amount of the increase of stock, the measure of damages is the excess of the market value above par. This case is generally cited as authority and also seems to hold that the stockholder's right to subscribe for the increase at par is absolute. No American case, decided on common law principles, squarely overrules this holding, but it is a well-known fact that, at the present day, in some jurisdictions by statute and in others in deference to public opinion, an advance is usually charged to original stockholders on an increase of such stock. This applies particularly to public service companies, on the principle that the profits should accrue to the corporation itself, thus affording opportunity for improvements to the plant and equipment and a betterment of the service to the public, rather than be withdrawn from the corporation directly to the shareholder's private profit. As a matter of law, however, the decision of this case seems to be an attempt to set up a new rule based on the *bona fides* of the participants and the apparent equity of the individual case. The Trial Court, Appellate Divis-

ion and Court of Appeals all differed in their judgments and in the conclusions of law leading thereto. Evidently, action by the legislature is necessary to determine just what the law is on this point in New York state.

RIGHT OF EMPLOYER TO MAKE EMPLOYMENT CONDITIONAL UPON EMPLOYEE NOT JOINING LABOR ORGANIZATION.

During the last decade there has been much legislation affecting liberty of contract, such as statutes limiting hours of labor, prescribing conditions of employment, etc. The decisions of the courts as to the constitutionality of legislation of this nature seem to present much confusion and conflict of authority.

In the case of *People v. Marcus (N. Y.),* 77 N. E. 1073, a provision of the New York Penal Code making it a misdemeanor for an employer to coerce or compel employees to enter into an agreement not to join a labor organization as a condition to securing or retaining employment, was declared unconstitutional by the New York Court of Appeals, as contrary to the constitutional provisions against depriving a person of rights and privileges, except "by the law of the land," or of "life, liberty or property without due process of law." This decision, in favor of the employer's freedom of contract, is treated as substantially settled by previous holdings that such contracts are not against public policy, citing *National Protective Asso. v. Cumming,* 170 N. Y. 315; and *Jacobs v. Cohen,* 183 N. Y. 207; and the court declares briefly, that restraints on personal liberty are limited to those which affect "the safety, health, and moral or general welfare of the public."

Similar statutes have been declared unconstitutional in other states on the same ground, and also because violative of the constitutional provision against class legislation; 29 L. R. A. (Mo.) 257; 52 L. R. A. (Ill.) 283; 58 L. R. A. (Wis.) 748; 66 L. R. A. (Kas.) 185; but in all the cases, including the New York case, the courts do not discuss at any length the question whether the restraint does affect the "moral and general welfare of the public," merely deciding in effect that it does not.

The power of the legislature to determine questions of public policy is perhaps universally admitted by the courts; and the difficulty of ascertaining whether or not there has been a valid exercise of the police power arises only when such exercise contravenes some constitutional provision. A review of the authorities on this point, and as to the exclusive power of the legislature to determine questions of public policy, seems to establish the following propositions:

The propriety of the exercise of the police power, *within constitutional limits,* is purely a matter of legislative discretion, with which the courts cannot interfere. *People v. King,* 110 N. Y. 418. But when such statute exceeds constitutional limits, then it is for the courts to decide whether it has such a reasonable connection with the public welfare as to appear upon inspection to be adapted to that end, for it cannot invade the rights of persons and property under